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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1618.

S. J. PASTORELLE,
Petitioner,

v.

J. W. COLLINS, *et al.*,
Respondents.

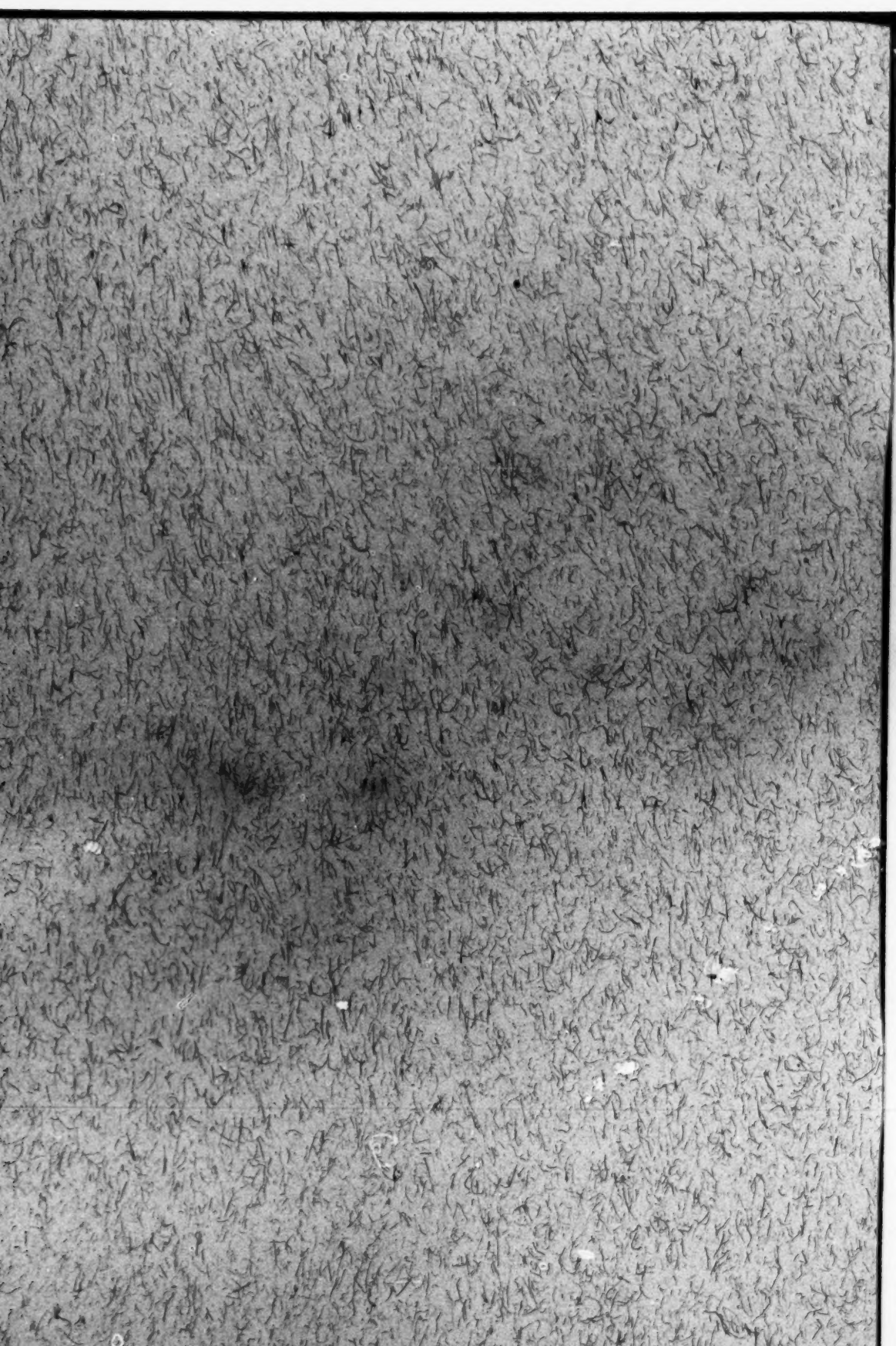
ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENTS IN OPPOSITION.

RUSSELL E. LEASURE,
SIDNEY D. L. JACKSON, JR.,
NORMAN S. JEAVONS,
GERALD W. BOSTON,
BAKER, HOSTETLER & PATTERSON,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

GEORGE I. MEISEL,
SQUIRE, SANDERS & DEMPSEY,
1800 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647



INDEX.

Opinions Below ---------- 1

Jurisdiction ---------- 1

Question Presented ---------- 1

Constitution and Statutes Involved ---------- 2

Restatement of the Case ---------- 2

Reasons For Denying the Petition For a Writ of Certiorari ---------- 8

I. Introduction ---------- 8

II. The Decision Below Presents No Conflict With Any Decision of Federal Courts of Appeals Pertaining to the Acceptance of Hill-Burton Funds as Requiring the Application of Fourteenth Amendment Protections ---------- 10

III. The Decision Below Does Not Conflict With Any Decision of the Federal Courts as to the Constitutionally Required Elements of Due Process Applicable to the Procedures of a Private Hospital ---- 11

IV. The Civil Rights Act of 1871 Does Not Raise a Substantial Federal Question Since That Statutory Issue Was Not Properly Raised in the Courts Below ---------- 13

Conclusion ---------- 15

Appendix 1 ---------- 16

CITATIONS.

Cases.

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) ---------- 12

Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa. 1970) ---------- 13

Collins v. Hardyman, 341 U.S. 651 (1951) ---------- 14

Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir., 1961) ---------- 9

Ferguson v. Georgia, 365 U.S. 570 (1961) ---------- 13

Fisco v. East Cleveland, 59 Ohio L. Abs. 385, 99 N.E. 2d 615 (1950) ---------- 13

Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) ---------- 9

Goldberg v. Kelly, 397 U.S. 254 (1970) ----------9, 11, 12

Grayson v. Harris, 267 U.S. 352 (1925) ---------- 9

Hannah v. Larche, 363 U.S. 420 (1960) ---------- 12

In Re Lamkin, 355 U.S. 59 (1957) ---------- 13

Kennedy v. General Beauty Products, Inc., 112 Ohio App. 505, 167 N.E.2d 116 (1960) ---------- 14

Monroe v. Pape, 365 U.S. 167 (1961) ---------- 14

Portland Railway Company v. Railroad Commission, 229 U.S. 397 (1913) ---------- 9

Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969) ----------10, 13

Shelley v. Kramer, 334 U.S. 1 (1948) ---------- 15

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) ---------- 10

Snowden v. Hughes, 321 U.S. 1 (1944) ---------- 14

State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co., 56 Ohio App. 309, 10 N.E.2d 935 (1937) ---------- 13

Stine v. Springfield City Lines, Inc., 106 Ohio App. 429, 155 N.E.2d 245 (1958) ---------- 13

The Civil Rights Cases, 109 U.S. 3 (1883) ---------- 15

Williams v. Georgia, 349 U.S. 375 (1955) ---------- 13

Constitution and Statutes.

United States Constitution, Fourteenth Amendment ----------2, 10, 11

42 U.S.C. § 1983 ----------2, 13, 14

42 U.S.C. § 1985(3) ----------2, 13, 14

Ohio Revised Code, § 2317.45 ----------2, 14, 16

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OPINIONS BELOW.

The opinion of the Ohio Supreme Court, the Cuyahoga County Court of Appeals, and the Trial Court are all unreported and are printed in Petitioner's Appendix.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

On the basis of the evidence in this case did the Courts below err in finding that the various hearings afforded Petitioner in connection with the termination of Petitioner's hospital privileges did not violate any applicable requirements of the Due Process Clause of the Fourteenth Amendment?

CONSTITUTION AND STATUTES INVOLVED.

The constitutional provision involved is the Fourteenth Amendment of the Constitution of the United States (Petitioner's Appendix, 61), the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985(3) (Petitioner's Appendix, 62), and Section 2317.45, Ohio Revised Code (Respondents' Brief In Opposition, Appendix 1).

RESTATEMENT OF THE CASE.

Because of numerous inaccuracies and material omissions in Petitioner's Statement of the Case (Pet. Cert. 4-10), Respondents present the following restatement of the material facts, which reveal the inapplicability of Petitioner's Questions Presented and his Reasons for Granting the Writ.

The thirty-eight Respondents were trustees, physicians on the staff and the Executive Director of the Euclid-Glenville Hospital Association, a private, nonprofit corporation (hereinafter, the "Hospital"). Significantly, unlike the cases cited in the Petition, the Hospital itself was never a defendant in this action. Petitioner's suit, based upon several purported conspiracies to terminate his hospital privileges, was filed against the individual Respondents for several million dollars in damages.

At the conclusion of Petitioner's evidence after four weeks of a jury trial (nearly 1400 pages of Record[1]), and

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[1] Petitioner failed to file the entire Record of the court below as required by Rule 21(1) of this Court in the absence of an agreement by Respondents to file only a portion thereof. There has been no such agreement and Respondents who refer to various portions of the Record herein therefore have submitted the entire Record for filing with this Court.

upon considering numerous exhibits, the trial court granted Respondents' motion for a directed verdict and observed, among other things, that to the extent Petitioner was entitled to due process rights, those rights had been afforded to him and that he received "fair treatment." None of the other ten judges who were asked to review Petitioner's appeal expressed a contrary opinion.

Respondents' Statement of the Case refers only to dates of certain formal meetings held by the Hospital's Trustees, the Medical Staff Executive Committee or Professional Matters Committee and rather than quoting from the testimony or unimpeached Joint Exhibits (JX), (comprised of contemporaneous minutes of the meetings stipulated to by all counsel), Petitioner merely characterizes such meetings as being "ex-parte" or "Star Chamber" proceedings (Pet. Cert. 4, 8), or sets forth argumentative conclusions complaining of defamatory charges made against Petitioner (Pet. Cert. 5, 7). There is no evidence in the Record which in any way supports such statements. The evidence adduced did disclose the following uncontroverted facts bearing upon Petitioner's claims of conflict on issues of procedural due process and the Civil Rights Act of 1871.

Petitioner, a physician, was associated with the Hospital for a period of years until March 22, 1966, at which time, following extensive investigations and a series of hearings, his privileges were terminated (JX6). Petitioner like all other physicians was granted certain privileges by the Hospital which were renewable on an annual basis (JX3).

The series of events which led up to, and resulted in the termination of Petitioner's privileges commenced in the summer of 1965. In July of that year, a patient was

admitted to the Hospital through the Emergency Room and was treated for a fracture by Petitioner, who was then on call (R. 645, 1285). As a result of Petitioner's attitude and treatment, the patient was prematurely removed from the Hospital by his parents and transferred to another hospital (R. 1371, 1372). The unusual occurrence of a patient's being removed to another hospital prior to recovery came to the attention of the Hospital administration (R. 69). The Executive Committee of the Medical Staff, in the performance of its duties under applicable By-Laws (JX3), commenced an investigation of the circumstances relating to the patient's transfer and concluded that Petitioner did not handle the matter properly. The investigation of this incident led to a reconsideration of Petitioner's professional activities and his relations with physicians, Hospital employees and patients.

In connection with Petitioner's due process contentions concerning lack of hearings or formal charges, and "rights" of appeal, the record shows that on July 29, 1965, the Chief of Surgery *wrote* Petitioner and *informed him* that the Medical Staff Executive Committee was investigating his handling of the above case (PX42). Petitioner, being apprised of the "charges" was *invited to and did attend* the Executive Committee meeting of September 10, 1965 (JX19). The Committee and Petitioner reviewed Petitioner's handling of that case. Prior to that date, Petitioner's counsel wrote the Hospital acknowledging that Petitioner knew the nature of the investigation (or in Petitioner's words "charges") and requested that the investigation be conducted by the Cleveland Academy of Medicine (PX7). The matter was presented to that organization which concluded that the investigation was an intra-hospital matter and did not intervene (contrary to

the misleading statement appearing at the bottom of page 4 of Petitioner's Statement of the Case).

Thereafter, as a result of the examinations and investigations, the Executive Committee felt it appropriate to submit to the Hospital's Active Staff its recommendations that Petitioner be removed from the Emergency Room fracture service, that he be required to have written consultation on all operative surgery, and that he be reduced in rank from the Active Staff to the Associate Staff. The minutes of the meeting of September 17, 1965 (JX20) amply summarize the basis for such action as follows:

> "Any action of the Executive Committee concerning S. J. Pastorelle, M.D. is based upon an accumulation of complaints from patients, relatives of patients, personnel, and physicians, upon an accumulation of evidence or indications of improper medical judgment, care of patients, non-compliance with hospital and Medical Staff regulations or policies, plus the unsatisfactory management of the Kaval case, the surreptitious taping of a phone call with a member of the Medical Staff, and, lastly, is based upon knowledge of circumstances that have engaged previous Executive Committees in attempting to resolve similar past problems with Dr. Pastorelle and to prevent continuance of his irregular practices."

Subsequently on October 11, 1965, Petitioner again *had notice of and did attend* the Executive Committee meeting, at which he was informed of its recommendations to be discussed by the Active Staff (JX23). Thereafter, a special meeting of the Active Staff was held and Petitioner's conduct was discussed at length. *Petitioner had prior notice of and was present at this meeting, had every opportunity to participate* in the discussions *and did in*

fact take part therein (JX24). After discussion, a *secret* ballot was taken and by a vote of 41 to 3 it was recommended by the Active Staff physicians that Petitioner be removed from the Emergency Room fracture service and by a vote of 41 to 2 it was recommended that he have formal written consultation on all major surgical cases.

Next, on October 25, 1965, Petitioner *had notice of and attended* a meeting of the Professional Matters Committee of the Trustees, at which the recommendations of the Active Staff were formally reviewed. Petitioner refused to present evidence or arguments on his own behalf, even though the Committee requested that he do so and afforded him a full opportunity to do so (JX25).

In December, 1965, the Professional Matters Committee met to discuss the annual appointment of all staff memberships. With respect to Petitioner, it was recommended that he be reappointed to the Active Staff, subject to the pre-existing restrictions, and that his status be reviewed prior to July 1, 1966 (JX26). This recommendation was thereafter submitted to and adopted by the Trustees (JX5).

At an Executive Committee meeting of the Active Staff on February 25, 1966, among other matters, Petitioner's recent treatment of another patient, Orlando, was discussed (JX28). It was pointed out that contrary to Hospital regulations, patient progress notes were two and one-half weeks behind and that Petitioner had consulted with a sales representative of a drug house and that the representative, at Petitioner's request, had examined the patient in the Hospital.

Petitioner was again *invited to and did appear before the Executive Committee* on March 2, 1966 to review his case management and deportment. Among other things,

the problem of his failure to cover his nose in surgery was discussed and considered as well as his handling of the Orlando case (JX29).

Thereafter, an Active Staff meeting was held, *notice of which was given Petitioner and which he attended,* at which time his professional conduct was again discussed. A *secret* ballot was taken and by a vote of 33 to 7, the Active Staff recommended that Petitioner's Hospital privileges be terminated (JX30).

Further reviewing action of this recommendation was taken by the Professional Matters Committee on March 22, 1966. *Again, Petitioner was invited to attend and did attend.* The matter was reviewed by the Trustees who then terminated Petitioner's privileges (JX31).

Throughout all of the hearings Petitioner was thoroughly aware of the reasons and basis for investigating his conduct and behavior. He was repeatedly and scrupulously given ample opportunity to examine the physicians who questioned his activities and to be heard and was heard, *on many different occasions.* The matter was duly reviewed by his colleague physicians and an opportunity for impartial review was afforded Petitioner by the Professional Matters Committee and by the Trustees. It is abundantly clear from the Record that any constitutional mandates relating to the applicable elements of due process were fully complied with.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI.

I.

INTRODUCTION.

Petitioner's reasons for granting certiorari assume:

(1) that the Ohio courts determined that Petitioner was not entitled to a due process, fair hearing, and

(2) that a due process, fair hearing was not afforded Petitioner.

Petitioner argues at some length that he was entitled to a due process, fair hearing in regard to his hospital privileges status because the hospital received federal financial construction assistance and under the Civil Rights Act of 1871. But the right, on whatever grounds, to a due process, fair hearing was never disputed by the Respondents or by the Ohio courts. The trial court recognized that Petitioner ". . . should have notice of what he is being accused of. He should have an opportunity to appear before his accusers and defend himself." (Pet. App. 4). And finally, the trial court *on the evidence*, concluded, "That has been done here. He [Petitioner] has had fair treatment . . ." (Pet. App. 4).

The Ohio Appellate Court " . . . examined with utmost care the entire transcript, and the long and lengthy bill of exceptions; . . . " (Pet. App. 7). That court concluded: " . . . after giving to the plaintiff the full benefit of the evidence as submitted, that the judgment entered by the trial Court, upon its determination of the evidence, was proper." (Pet. App. 7).

Although Petitioner in his Statement of the Case asserts a lack of knowledge of the charges, this simply does

not square with the Record as has been emphasized in the foregoing Restatement of the Case. The only other claim of denial of due process was the refusal of the Respondents to have Petitioner's personal attorney and a court reporter present at the various meetings of the medical staff and committees thereof at which Petitioner's professional qualifications, conduct and standing were considered.

Petitioner interprets *Goldberg v. Kelly,* 397 U.S. 254 (1970) as requiring counsel and a formal record as prerequisites in every case, to a due process, fair hearing. That decision, however, was rendered "in the present context" (397 U.S. 267) of a *governmental administrative hearing.* It is consistent, federal jurisprudence that under due process "the nature of the hearing should vary depending upon the circumstances of the case." *Dixon v. Alabama State Board of Education,* 294 F.2d 150, 158 (5th Cir., 1961); and see cases cited *infra,* Part III.

Both the questions of the nature of the hearing that would afford due process under the particular circumstances of this case and whether Petitioner had been afforded such due process were decided on the particular facts of this individual case. It is ". . . the ordinary rule . . . that the decision of the state courts upon a question of fact can not be made the subject of inquiry here." *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland Railway Company v. Railroad Commission,* 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952).

A decision by this Court on this case will establish no fundamental law.

II.

THE DECISION BELOW PRESENTS NO CONFLICT WITH ANY DECISION OF FEDERAL COURTS OF APPEALS PERTAINING TO THE ACCEPTANCE OF HILL-BURTON FUNDS AS REQUIRING THE APPLICATION OF FOURTEENTH AMENDMENT PROTECTIONS.

Petitioner maintains that the decision of the Ohio Supreme Court in overruling his motion to certify and dismissing his appeal to that Court on grounds that "no substantial constitutional question" was presented to it, is irreconcilable with prior decisions of federal courts of appeals. The decisions relied upon by Petitioner to demonstrate the existence of such a conflict so as to raise a substantial federal constitutional question are not in conflict, implicitly or expressly, with the holdings of either the Ohio Supreme Court or the Cuyahoga County, Ohio, Court of Appeals in this case.

Petitioner cites the decisions of *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964) (Pet. Cert. 10) and *Sams v. Ohio Valley General Hospital Association,* 413 F.2d 826 (4th Cir. 1969) (Pet. Cert. 10) for the proposition that receipt by a private hospital of Hill-Burton funds from the federal government (Hospital Survey and Construction Act, 42 U.S.C. § 291 *et seq.*), carries with it the obligation by that hospital recipient to observe Fourteenth Amendment guarantees in its actions, including any action terminating the privileges of a staff physician. The Ohio Supreme Court declined to accept jurisdiction and Ohio Court of Appeals' decision (Pet. App. 5-7) made no holding whatsoever that the receipt of such federal money by a private hospital did not render Fourteenth Amendment principles applicable to the procedures followed by such a hospital in terminating a physician's privileges. All of the cases cited by Petitioner in Part I of his Reasons

for Granting the Writ may be correct statements of the federal law on this issue, but Petitioner has made no showing, and none exists in the Record filed with this Court, to demonstrate any conflict between those cases and those of the Ohio courts in this case.

Indeed, as noted, the trial court *did* consider the application of due process and constitutional mandates to the Hospital procedures, but found no deprivation of due process on the basis of the evidence presented. Consequently, the affirmance of the trial court's judgment by the Ohio Court of Appeals and the Ohio Supreme Court cannot possibly be construed as holding that receipt of Hill-Burton funds rendered the due process clause inapplicable to the Hospital's procedures, since the trial court held that due process did apply and was applied. Therefore Petitioner's contention that a conflict exists between the federal courts and the Ohio courts is illusory and without any foundation.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE FEDERAL COURTS AS TO THE CONSTITUTIONALLY REQUIRED ELEMENTS OF DUE PROCESS APPLICABLE TO THE PROCEDURES OF A PRIVATE HOSPITAL.

Petitioner contends that once the Fourteenth Amendment applies to the procedures of a private hospital, that the Fourteenth Amendment due process clause invokes the standards of "an administrative evidentiary hearing." Petitioner quotes at length from the decision of this Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970) (Pet. Cert. 12) which held that in the context of a *governmental* administrative hearing involving a citizen's right to receive welfare benefits, certain elements of due process must be satisfied. Respondents do not question the holding of this

Court in the *Goldberg* case, nor do Respondents seek to distinguish it from the present case for the reason that the Ohio Supreme Court and the Ohio Court of Appeals, in affirming the trial court, made *no* holdings that in any way conflict, directly or indirectly, with the *Goldberg* decision or the other decisions cited by Petitioner in Part II of his Petition.

Petitioner never contended in the trial court, nor in the Ohio Court of Appeals, nor in the Ohio Supreme Court that the applicable standard of due process in the procedures of private hospitals in terminating a physician's privileges, were the standards of "an administrative evidentiary hearing." Accordingly, the question of whether the standards of an administrative evidentiary hearing were satisfied in this case was not even raised in the courts below and cannot be raised in an appeal to this Court. Since the courts below never were faced with the issue as Petitioner now frames it, the decisions of the Ohio Court of Appeals and the Ohio Supreme Court cannot be construed as conflicting with this Court's decision in *Goldberg,* or the other decisions cited by Petitioner.

Moreover, the cases relied upon by Petitioner almost uniformly observe that due process must be considered in light of the institution under consideration, the identity of the parties and "in the *present context*" (*Goldberg, supra*). Clearly, due process requirements for a fair hearing vary according to the circumstances and must be adapted to particular situations. *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961); *Hannah v. Larche,* 363 U.S. 420, 442 (1960).

The issue of whether Petitioner was afforded a hearing compatible with the requirements of due process is a question of law and fact that can only be determined by reviewing the 1397 pages of Record and Exhibits in the trial court. The standards of due process set forth in

Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969) (Pet. Cert. 11), and *Citta v. Delaware Valley Hospital,* 313 F. Supp. 301 (E.D. Pa. 1970) (Pet. Cert. 13) were in fact satisfied in this case as is amply demonstrated by a review of the Record. Therefore, there exists no conflict between the decisions of this Court or other federal courts and the decisions below of the Ohio courts.

IV.

THE CIVIL RIGHTS ACT OF 1871 DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION SINCE THAT STATUTORY ISSUE WAS NOT PROPERLY RAISED IN THE COURTS BELOW.

It is fundamental that in order for a substantial federal question to be a ground for granting a petition for writ of certiorari from a state court, the federal question must have been properly raised in the state court. *Williams v. Georgia,* 349 U.S. 375, 382-83 (1955), *In Re Lamkin,* 355 U.S. 59 (1957); *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961). The rule is well settled in Ohio that a party may not, on appeal, raise a new theory of relief not tried below. *Stine v. Springfield City Lines, Inc.,* 106 Ohio App. 429, 434, 155 N.E.2d 245, 249 (1958); *Fisco v. East Cleveland,* 59 Ohio L. Abs. 385, 388, 99 N.E.2d 615, 617 (1950); *State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co.,* 56 Ohio App. 309, 315, 10 N.E.2d 935, 939 (1937).

The Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985(3), creates specific rights and remedies on which an independent cause of action may be based, entirely separate and different from the common law conspiracy actions pleaded and tried below in this case. Nowhere in Petitioner's petition filed with the trial court, his amended petition filed with the trial court, nor else-

where in the pleadings was there any allegation of or reference to the Civil Rights Act now relied upon to raise a substantial federal question. Only after conclusion of a four-week jury trial, did Petitioner file a trial brief which for the first time purported to raise an issue of the application of the Civil Rights Act, which accounted for the trial judge's reference to the Civil Rights Act in his oral opinion (Pet. App. 3).

Under applicable Ohio law, Petitioner was barred from basing error or otherwise placing reliance on the Civil Rights Act. Ohio Revised Code § 2317.45; *Kennedy v. General Beauty Products, Inc.*, 112 Ohio App. 505, 167 N.E.2d 116 (1960). Under this statute a party must give reasonable notice to the adverse party of its intention to rely on a federal statute, and had Petitioner done so, Respondents would have answered differently and made different trial preparations. This fact explains why neither the Ohio Court of Appeals nor the Ohio Supreme Court made any reference to the Civil Rights Act in their respective opinions affirming the judgment below. On the appeals to the Ohio Court of Appeals and the Ohio Supreme Court, Respondents consistently pointed out Petitioner's failure under Ohio statutory and decisional law to comply with the simple, straight-forward procedure of raising in the trial court reliance on a federal statute as a basis for his claim.

In addition to Petitioner's failure to raise timely the Civil Rights Act in the Ohio courts, it is clear that the statutes can have no application to the facts of this case. Under 42 U.S.C. §§ 1983 and 1985(3), the authority is uniform and overwhelming that a plaintiff must allege and prove the deprivation of a constitutional right and that defendants acted under "color of state law." *Collins v. Hardyman*, 341 U.S. 651 (1951); *Snowden v. Hughes*, 321 U.S. 1 (1944); *Monroe v. Pape*, 365 U.S. 167 (1961);

Shelley v. Kramer, 334 U.S. 1 (1948); *The Civil Rights Cases,* 109 U.S. 3 (1883). Petitioner not only never alleged that the individual Respondents acted under "color of law," but offered no such proof. The Respondents were sued as individuals for a common law conspiracy.

Thus, any claim for money damages predicated on the Civil Rights Act is wholly deficient for the reasons that the federal statutes were not properly raised in the Ohio courts and that Petitioner never alleged nor proved the essential elements of a cause of action under these statutes.

CONCLUSION.

Since no important procedural or substantive questions are presented and since the decision below is not in conflict with any federal decisions, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RUSSELL E. LEASURE,
SIDNEY D. L. JACKSON, JR.,
NORMAN S. JEAVONS,
GERALD W. BOSTON,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

GEORGE I. MEISEL,
1800 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Respondents.

Of Counsel:
BAKER, HOSTETLER & PATTERSON,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

SQUIRE, SANDERS & DEMPSEY,
1800 Union Commerce Building,
Cleveland, Ohio 44115.

APPENDIX 1.

Ohio Revised Code, § 2317.45.

Reasonable notice to adverse party.

Any party may present to the trial court any admissible evidence of the common law and statutes of every state, territory, or other jurisdiction of the United States, but to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.